

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civil Action No. 4:95CV-169-R
v.)	
)	
JAF OIL COMPANY, INC.,)	
and PETER E. JOLLY,)	
)	
Defendants.)	

UNITED STATES' RESPONSE TO "PETITION FOR WRIT OF MANDAMUS"

Plaintiff, the United States of America, files this response to the "Petition for Writ of Mandamus Compelling Révocation of Administrative Order, Declaratory Judgment and for Injunction" filed by pro se Defendant Peter E. Jolly ("Jolly"). The Petition should be quashed.

Jolly names the Court, the United States, EPA Region IV, and the Water Management Division as parties in a mandamus action. While many things about the Petition are not clear, it is plain that no such civil action yet exists. Under the Federal Rules of Civil Procedure, Jolly cannot proceed with this "mandamus" suit. No such matter is presently pending before the Court. As explained below, the Court would also lack subject matter jurisdiction over this suit.

Fed. R. Civ. P. 3 states "a civil action is commenced by filing a complaint with the court." Jolly has not filed a complaint. Nor has Jolly plead a counterclaim in his Answer to the United States' Complaint filed September 1, 1995 in Civil



Action No. 4:95CV-169-R. Under Fed. R. Civ. P. 13(a), such a counterclaim was compulsory because it "arises out of the transaction or occurrence that is the subject matter of the opposing parties claim." At this point, Jolly may amend his pleadings only with leave of Court pursuant to Rule 13(f). As Jolly has failed to initiate a civil action against the named "respondent" and "real parties in interest," the Petition should be quashed.

Although Jolly has retained counsel for his co-defendant company, JAF Oil Inc., Jolly is proceeding pro se as to his individual liability under Claim 2 (veil piercing) and Claim 3 (direct liability) of the Complaint. This Circuit has adopted the rule that civil pro se litigants are entitled to no special treatment, procedural help or other solicitude. See Brock v. Hendershott, 840 F.2d 339, 343 (6th Cir. 1988). Jolly must comply with the Federal Rules of Civil Procedure like any other litigant. A most basic requirement is that he must initiate a civil action before seeking relief.

Jolly remains at liberty to file a separate "mandamus" action, or attempt to amend his answer to assert an omitted counterclaim. The United States notes, however, that this effort likely will be futile for a number of reasons, including the following:

First, original mandamus actions in district court of the sort requested by Jolly have been abolished by Fed. R. Civ. P. 81(b) ("The writs of scire facias and mandamus are abolished");

Wright & Miller, Fed. Pract. and Proc., §3134 ("Rule 81(b) also abolished the writ of mandamus in district court practice. It does not affect the power of the courts of appeals¹ to issue such writs").

Nor may Jolly bring a mandamus action under 28 U.S.C. § 1361,² a statute which authorizes limited and narrowly circumscribed relief, "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. That statute "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." Heckler v. Ringer, 466 U.S. 602, 616 (1984), quoted in, Cooper Industries, Inc. v. U.S. Env'tl. Protection Agency, et. al, 775 F.Supp. 1027, 1040 (W.D. Mich. 1991); Bisson v. Secretary of Health and Human Services, 787 F.2d 181 (6th Cir. 1986). Jolly's "Petition" fails in both respects, and the Court would therefore lack subject matter jurisdiction over it.

It cannot be disputed that Jolly failed to file an appeal to

¹ The case relied upon by Jolly for the mandamus authority, Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977), involved this power of the Courts of Appeal to issue writs of mandamus. Indeed, as the Bauman court noted, "the writ has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" 557 F.2d at 654 (quotations omitted).

² Jolly has not cited to this statute. The United States raises it only in the interests of a more full exposition of the matter.

this Court, and thus failed to exhaust his exclusive, statutory appeal under the Safe Drinking Water Act, § 1423(c)(6), 42 U.S.C. § 300h-2(c)(6) ("SDWA")³; see also Fairview Township v. EPA, 773 F.2d 517, 528 (3d Cir. 1985) (finding mandamus jurisdiction inappropriate in CWA citizen suit context because plaintiff had a remedy under the Administrative Procedure Act).

Additionally, no remedy lies under Section 1361 unless the alleged duty imposes a mandatory or ministerial obligation. Short v. Murphy, 512 F.2d 374 (6th Cir. 1975). "If the alleged duty is discretionary or directory, the duty is not "'owed.'" Id. at 377. Here, Jolly does not seek to compel EPA to perform a mandatory, ministerial act. Rather, he seeks to compel EPA to perform the discretionary task of vacating its Administrative Order. Under section § 300h-2(c) of the SDWA, the Administrator has the discretion to issue an administrative order. As such, any revocation of the administrative order would be a matter of enforcement discretion.

Second, Jolly seeks revocation of an administrative order that was not issued against him, but rather against JAF. As a pro se litigant, he cannot represent the company, Doherty v. American Motors Co., 728 F.2d 334, 340 (6th Cir. 1984), even if he is an officer of the corporation. See Ginger v. Cohn, 426

³ This section of the SDWA specifically allows "any person against whom an order is issued or who commented on a proposed order . . . to file an appeal of such order with the United States District Court . . . in the district in which the violation is alleged to have occurred within 30 days after the order is issued." § 1423(c)(6), 42 U.S.C. § 300h-2(c)(6)

F.2d 1385, 1386 (6th Cir. 1970).

Finally, as will be shown in this enforcement action, Jolly's central allegation that EPA denied him procedural due process is patently frivolous. EPA provided the opportunity for a hearing, took and responded to Mr. Jolly's comments, and advised Jolly of his rights to appeal at every step in the process. Jolly missed every statutory deadline for requesting a hearing; time for filing an appeal with this Court ran four years ago.

For all of the foregoing reasons, the United States respectfully requests that this Court quash Defendant Jolly's "Petition for Mandamus."

Respectfully submitted,

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CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the United States' Response to Petition for Writ of Mandamus was sent by first class mail on the 31th day of May 1996 to:

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